United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1921

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

STANLEY V. TUCKER, Plaintiff and Appellant, -vs- JEAN NEAL, ROBERT R. ANDERSON and ANDERSON & ANDERSON, etc., Defendants and Appellees.	NO. 74-1921

BRIEF FOR APPELLEES

On Appeal from Judgment of the United States

District Court, District of Connecticut

JEAN NEAL
ROBERT R. ANDERSON
ANDERSON & ANDERSON
Appellees Pro Se
621 East Main Street
P. O. Box 671
Santa Paula, California
93060

CERTIFICATE OF SERVICE

I, ROBERT R. ANDERSON, hereby certify that on September 30, 1974, I served the foregoing BRIEF FOR APPELLEES upon the appellant named therein by sending him two (2) true copies thereof by air mail from Santa Paula, California, with postage prepaid, addressed to him as follows:

STANLEY V. TUCKER
P. O. Box 35
Hartford, Connecticut 06101

Robert R. Anderson
ROBERT R. ANDERSON

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PRELIMINARY NOTE

Citations herein to appellant's brief ("Br ___") and to the appendix ("App ___") will be made by those abbreviations, with page numbers. No such convenient symbols are available for parts of the record omitted from the appendix, whose inadequacy (not to mention its failure to fulfill appellant's advance designation) has already been pointed out in appellees' motion to dismiss the appeal. Those parts of the record will be cited in footnotes.

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This action is in part a collateral attack upon a judgment of a federal court in California, which established a money judgment of a California state court. The antecedent state court litigation, which is not at issue on this appeal, will be identified as such. Otherwise, references to the "California" court, proceedings, or judgment are to the United States District Court for the Northern District of California, to the action in that district between appellant and appellee JEAN NEAL, and to the judgment rendered therein. That judgment, as registered in Connecticut, is referred to at least once as the "Connecticut judgment."

ISSUES ON APPEAL

1. WHETHER MR. TUCKER CAN COLLATERALLY ATTACK THE CALIFORNIA JUDGMENT FOR LACK OF PERSONAL JURISDICTION: RES JUDICATA.

2. WHETHER THE CALIFORNIA COURT HAD PERSONAL JURISDICTION OF MR. TUCKER: THE "MINIMUM CONTACTS" DOCTRINE.

3. WHETHER THE CALIFORNIA COURT HAD PERSONAL JURISDICTION OF MR. TUCKER: SERVICE OF PROCESS.

4. WHETHER THE CALIFORNIA ACTION WAS BARRED BY LIMITATIONS.

5. WHETHER THE CALIFORNIA JUDGMENT IS VOID FOR EXTRINSIC FRAUD.

6. WHETHER THE JUDGMENT LIENS ARE INVALID BECAUSE NOT RECORDED BY THE UNITED STATES MARSHAL.

7. WHETHER MR. TUCKER WAS ENTITLED TO ADD THE PROPOSED THIRD COUNT TO HIS COMPLAINT, CHALLENGING THE CONNECTICUT JUDGMENT LIEN STATUTE.

8. WHETHER MR. TUCKER WAS ENTITLED TO AN ORDER OF THE DISTRICT COURT DISCHARGING "EXCESSIVE" JUDGMENT LIENS.

9. WHETHER COMPETENT EVIDENCE IN THE DISTRICT COURT WARRANTED SUMMARY JUDGMENT FOR APPELLEES.

STATEMENT OF THE CASE

The Proceedings

Appellant STANLEY V. TUCKER brought this action in the District of Connecticut on April 10, 1973, with a one-count complaint for injunctive and declaratory relief, seeking to nullify nine allegedly "false and fraudulent" and "pretended" judgment liens upon property of his in the cities of Hartford, Bristol and Torrington, and for damages of $200,000. The liens were based upon a judgment against Mr. TUCKER in the Northern District of California, registered in Connecticut pursuant to 28 USC § 1963.[1] The California action, in turn, was upon a judgment of a California state court[2] assessing Mr. TUCKER damages for malicious prosecution. His action here is against appellees JEAN NEAL, the judgment creditor and lienor; ROBERT R. ANDERSON, her attorney in all pertinent proceedings in California, who registered the federal judgment in Connecticut and recorded the liens; and ANDERSON & ANDERSON, his law partnership. By amendment Mr. TUCKER added a count to his complaint alleging that the California judgment was void for lack of personal jurisdiction, and he was denied leave to assert a third

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[1] Appellees' motion for summary judgment, filed 12/12/73, pp. 17-19, Exhibit H.

[2] Mr. TUCKER's motion for new trial, served 3/10/74, Exhibit D.

count, challenging the constitutionality of the judgment lien law, Conn Gen Stats § 49-44. (App D1-D7) The amended complaint brought in five more liens and demanded damages of $500,000. Appellees answered the complaint, and Mrs. NEAL counterclaimed for foreclosure of the liens to satisfy her judgment.

After various proceedings not at issue on appeal, appellees moved for summary judgment. Mr. TUCKER then made his own motion for summary judgment and simultaneously moved the district court to "discharge excessive liens," alleging that his property at 38 S. Whitney Street in Hartford was sufficient by itself to secure Mrs. NEAL's judgment. The court denied both of Mr. TUCKER's motions, granted the motion of appellees for summary judgment (App B1-C2), and later filed a formal judgment awarding Mrs. NEAL the amount of her unpaid Connecticut judgment and ordering the liens to be foreclosed by sale in supplemental proceedings.

Meanwhile, Mr. TUCKER had filed motions under Rule 59(a) of the Rules of Civil Procedure for a "new trial" on grounds of error of law and newly discovered evidence and under Rule 60(a) and (b) to vacate the ruling and grant his motion for summary judgment on the same grounds and on the further grounds of surprise and fraud. The

court denied both motions (App A1) and on June 18, 1974, Mr. TUCKER took this appeal from the judgment itself, from the order refusing to vacate it, and purportedly from the denial of his "new trial" motion.

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The Facts

The evidentiary and ultimate facts of the case are not in material conflict, with an exception noted below. Appellees' motion for summary judgment was based upon the affidavit of ROBERT R. ANDERSON, with attached exhibits, and upon unanswered requests for admissions filed July 20 and October 25, 1973. Mr. TUCKER's motion for summary judgment relied upon his accompanying affidavit, which by reference was the factual basis of his opposition to the motion of appellees. The district court concluded that "[a]ny dispute between the plaintiff and the defendants is purely one as to the law and is, therefore, well-suited to summary disposition." (App B6)

Mr. TUCKER lived in California until November 1961, when he moved to Connecticut. From then until 1969, according to his affidavit, he came to California to visit his children, to vacation, and "to seek to vindicate their and my federally guaranteed rights by litigation." Mr. ANDERSON stated in his affidavit that he represented defendants in 15 of 36

actions filed by Mr. TUCKER in the state and federal courts of California and between December 1966 and July 1969 saw Mr. TUCKER in that state on at least 50 occasions, often in court. In his brief Mr. TUCKER acknowledges that in the period 1965-1969 he was in California "constantly." (Br 24) According to the ANDERSON affidavit, uncontradicted by Mr. TUCKER, a series of legal encounters between Mr. TUCKER and Mrs. NEAL led to the case at hand. He first sued her in Santa Barbara County, Calif., and his action was dismissed. When he sued her again, in Santa Clara County, Calif., she retaliated with an action filed on her behalf by Mr. ANDERSON, charging Mr. TUCKER with malicious prosecution. Mr. TUCKER cross-complained, and personally tried the case to a jury in April 1969. The verdict awarded Mrs. NEAL damages of $20,723.61, and the judgment was affirmed on appeal. In July of that year (or June, by the TUCKER affidavit) Mr. TUCKER left California for good. He states in his brief that besides those cases, or others known to Mrs. NEAL, he engaged in "random litigation over years apart and hundreds of miles apart in different court systems with different litigants and with different claims or issues." (Br 20)

In July 1971, Mrs. NEAL filed a complaint (App H1) to establish her unpaid state court judgment in the U. S.

District Court for the Northern District of California. Mr. ANDERSON served the summons and complaint upon Mr. TUCKER by certified air mail, pursuant to the California long-arm statute, Code Civ Proc § 415.40, and received a postal receipt therefor signed by Mr. TUCKER. (App E11-E12)[3] Mr. TUCKER concedes actual notice. (Br 6) He first responded to the complaint with a "special appearance * * * made specially and solely for the purpose of pleading to the jurisdiction of the court"[4] and with a motion to dismiss the case on a number of grounds, including "[l]ack of 'personal' jurisdiction."[5] When his motion failed,[6] he answered the complaint, alleging in part that "defendant in this action denies that this court has jurisdiction over him," and three of his seven affirmative defenses likewise objected to the jurisdiction of the court.[7] Mrs. NEAL moved for summary judgment, and in his opposition to the motion Mr. TUCKER again raised the jurisdictional issue.[8] The motion was granted, and judgment for Mrs. NEAL was given on July 21, 1972.[9]

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[3] Appellees' motion for summary judgment, p. 6 (ANDERSON affidavit); Mr. TUCKER's motion for new trial, Exhibit A1-A2.

[4] Appellees' request for admissions, filed 10/25/73, No. 1, Exhibit A.

[5] Ibid., No. 2

[6] Ibid., No. 3, Exhibit B.

[7] Ibid., No. 5.

[8] Ibid., No. 8.

[9] Ibid., No. 9.

Mr. TUCKER failed to appeal the judgment within the time allowed,[10] but attempted to appeal late.[11] When leave to do so was refused by the district court,[12] he appealed from that order,[13] and the appeal was dismissed for lack of appellate jurisdiction.[14] His petition to the United States Supreme Court for a writ of certiorari, docket No. 72-1611, was denied on October 19, 1973. ____ U S ____, 94 SCt 49. A certification of the judgment was filed for registration in the District of Connecticut on September 5, 1972, docket No. 15291,[15] and without further notice Mrs. NEAL's judgment liens were thereupon recorded upon Mr. TUCKER's property. On April 10, 1973, he commenced this action to defeat the liens.

As indicated earlier, the evidence on the cross-motions for summary judgment differed in only one particular. In paragraph 7 of Mr. TUCKER's affidavit, he stated that he had copies of all documents filed in the California action and that he had "never recieved [sic] or seen any court memorandum or order" passing upon his challenge to the court's jurisdiction. Contrary to that averment is

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[10]Appellees' request for admissions, filed 7/20/73, Nos. 4 and 13.

[11]Ibid., No. 6; appellees' motion for summary judgment, p. 10 (ANDERSON affidavit).

[12]Ibid., Req. Adm., Nos. 7 and 8; motion, p. 13, Exhibit D.

[13]Ibid., Req. Adm., Nos. 9 and 10; motion, p. 14, Ex. E.

[14]Ibid., Req. Adm., Nos. 11 and 12; motion, p. 15, Ex. F.

[15]Ibid., Req. Adm., No. 15; motion, p. 17, Ex. H.

Mr. TUCKER's admission of facts Nos. 2 and 3 of the request for admissions filed October 25, 1973. Those admissions included as Exhibit B to the request a copy of the California court's order of November 16, 1971, denying Mr. TUCKER's motion to dismiss, wherein the court ruled: "The court concludes that it has jurisdiction, that service of process was made in conformity with the federal rules, and that venue is proper."

ARGUMENT

1. WHETHER MR. TUCKER CAN COLLATERALLY ATTACK THE CALIFORNIA JUDGMENT FOR LACK OF PERSONAL JURISDICTION: RES JUDICATA.

Mr. TUCKER's appeal is largely a collateral attack upon Mrs. NEAL's California judgment, on the ground that the Northern District of California was without personal jurisdiction of him. He does not repeat to this Court the discredited assertions made in his motion for summary judgment, that the jurisdictional issue was ignored in California. The record, bolstered by Mr. TUCKER's own admissions, plainly establishes otherwise: That he appeared in California, litigated the question there, and it was squarely decided against him. Under the rule of Baldwin vs Iowa State Traveling Men's Assn. (1931), 283 US 522, 51 SCt 517, 75 L ed 1244, the question of a court's jurisdiction in personam, once put in issue and adjudicated, is res judicata: "Public policy dictates that there be an end of litigation; that those who have contested an issue be bound by the result of the contest, and that matters once tried shall be considered forever settled * * *." (283 US at 525.) Thus, the jurisdiction of the California court over Mr. TUCKER, having been

litigated and determined, is not subject to reconsideration elsewhere.

But Mr. TUCKER demands the privilege of relitigation, in spite of Baldwin, because of alleged fraud in Mrs. NEAL's procurement of summons on an ex parte application. The substance of the charge is examined at length hereafter (see discussion following issue No. 5), but for now it is enough to note that Mr. TUCKER leaves unexplained how the mere issuance of summons— which is always done ex parte and confers no jurisdiction upon the court— deprived him of a "full and fair hearing," when he was later heard in adversary proceedings upon his motion to dismiss the action and Mrs. NEAL's motion for summary judgment. Besides, the glossy one-page affidavit upon which Mr. TUCKER "relitigated" the issue on the summary judgment motions below overwhelms any suggestion that fraud was needed to obtain jurisdiction of him in the Northern District of California.

2. WHETHER THE CALIFORNIA COURT HAD PERSONAL JURISDICTION OF MR. TUCKER: THE "MINIMUM CONTACTS" DOCTRINE.

Only if Mr. TUCKER is to be permitted a collateral jurisdictional attack upon the California judgment does this issue arise. The question is whether, at the commencement of the California action, he had had such "minimum contacts" with the State of California that maintenance of the suit against him there did "not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. vs State of Washington (1945), 326 US 310, 316, 66 SCt 154, 90 L ed 95, 161 ALR 257. A single, isolated act within the forum state is sufficient for judicial jurisdiction over a non-resident, where that act produces the cause of action. McGee vs International Life Ins. Co. (1957), 355 US 220, 78 SCt 199, 2 L ed 2d 223; Rosenblatt vs American Cyanamid Co. (1965), 86 SCt 1, 15 L ed 2d 39; see Rest., Conflict of Laws 2d (1969) § 36(1), and cases collected at 24 ALR3d 532, 78 ALR2d 397. The court must consider the quality of the contacts: "[I]t is essential in each case that there be some act by which the defendant purposefully availed himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of

laws." Hanson vs Denckla (1958), 357 US 235, 253, 78 SCt 1228, 2 L ed 2d 1283.

Appellees established in the district court that in a span of less than three years there were are least 50 instances of Mr. TUCKER's physical presence in California and that he had made use of the courts of the state for some 36 civil actions. He goes well beyond such fragmentary data, to concede that from 1965 to 1969 he was in California "constantly." (Br 24) California was the domicil of his children, the venue of his litigation. His activities in the state, according to appellees' summary judgment motion, were many and varied. To quote: "Even disregarding Mr. TUCKER's ordinary comings and goings in California, and overlooking the sheer amount of time he spent there, and ignoring, as well, all but one of his 36 civil actions in its courts, that one action was a malicious prosecution of Mrs. NEAL."[16] The tort was committed in California and then, fittingly, adjudicated in a California court. Mr. TUCKER acted in his own defense pro se, and simultaneously orchestrated and conducted a claim for affirmative relief of $341,000.[17] Judgment was for Mrs.

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[16]Appellees' motion for summary judgment, p. 22 (memorandum of law).

[17]Ibid., p. 5 (ANDERSON affidavit).

NEAL, affirmed on appeal. The ensuing action in the federal court whose jurisdiction Mr. TUCKER denies merely elevated Mrs. NEAL's right to the status of a national judgment, which by the salutary means of registration became enforceable everywhere.

The district court in Connecticut, although holding that the California judgment was not subject to collateral attack, found Mr. TUCKER's contacts with California to be "more than sufficient to satisfy" the due process requirements of International Shoe, supra. (App B15) Mr. TUCKER's argument to the contrary is that the nature of his life and times in California anointed him with some sort of immunity to suit in that state, because his activities there were the "exercise of fundamental first amendment freedoms." (Br 16) Litigation in particular, he contends, is a "federally protected right" (Br 17, 22) and has never been held a basis for jurisdiction over a non-resident. He cites several cases, all out of point. Thus, a child support order against a non-resident was quashed in Titus vs Superior Court (1972), 23 Cal App 3d 792, 100 Cal Rptr 477 (Br 17), where Mr. Titus's contacts with the California forum were described as only "legalistic." (23 Cal App 3d at 803, 100 Cal Rptr at 486.) Mr. TUCKER is attracted to that term because he thinks it neatly

vaporizes his campaign of litigation in California courts. What the court meant by "legalistic," however, was " in contemplation of law"——for Roger Titus had never even been in California, much less sued anyone there. Mr. TUCKER next cites Collar vs Penninsular Gas Co. (Mo 1956), 295 SW2d 88, calling it "long the leading case" on the subject. (Br 18) That decision, however, held only that by the law of Missouri the malicious prosecution of a civil action by a foreign corporation did not constitute "doing business." That, of course, was 1956, prior to the "single-act" holding of McGee vs International Life Ins. Co., supra, and the court did not discuss the tort itself as a jurisdictional basis. The law of Missouri was subsequently changed by statute, and Collar would not be decided the same way today. VAMS § 351.630(2) (1962 Supp). Moreover, as a morsel of due process law——if it was ever intended as such——Collar turned out to be slightly indigestible a few years afterward in the Eighth Circuit, whose table manners, however, constrained it to say only that "[s]ubsequent events strongly indicate a local recognition that the Collar case does not rest upon unalterable constitutional principles." Jennings vs McCall Corporation (8th Cir 1963), 320 F2d 64, 70.

In support of his contention that litigation per

se cannot be counted among the "minimum contacts" justifying extraterritorial jurisdiction, Mr. TUCKER next cites Dragor Shipping Corp. vs Union Tank Car Co. (9th Cir 1966), 361 F2d 43. But Dragor is readily distinguishable on the ground that the cause of action there, for breach of contract and non-payment of a promissory note, was not one "arising out of or involving business done or transactions arising" in the Arizona forum. ARS § 10-481. The contract and note had been executed and delivered in New York and were only breached after defendant Dragor, a Delaware corporation with its principal office in New York, had "withdrawn" its qualification to do business in Arizona. The case actually supports the position of appellees, for the court held, "If that contract and promissory note have a 'substantial connection' with Arizona, the requirements of due process have been satisfied," citing McGee vs International Life Ins. Co., supra. Mrs. NEAL's cause of action against Mr. TUCKER in the Northern District of California had all of its "connections" with that state. Mrs. NEAL was at all relevant times a resident of California. In 1965 Mr. TUCKER had maliciously maintained suit against her in a California court. At her suit, the tort was reduced to judgment in California in 1969 in an action in which Mr. TUCKER actively participated and sought affirmative

relief. In the ensuing federal action in the Northern District of California, Mrs. NEAL's state court judgment was her cause of action, which thus had arisen in California.

Last of the cases assertedly standing for Mr. TUCKER's contention that litigation must be disregarded in evaluating the local "contacts" of a non-resident defendant is Munchak Corporation vs Riko Enterprises, Inc. (NC 1973), 368 FSupp 1366. That case, too, is off-point, and for the same reason as Dragor: All of the acts making up the tort sued upon had occurred in Pennsylvania. The court rejected the "stream of commerce" theory, for the defendant, a professional basketball team, had put nothing into "commerce" except entertainment, and entertainment was not the cause of the harm. The court found that the defendant's activities within the forum had consisted only of scouting players (but not contracting or negotiating with them), having some of its games, all played elsewhere, televised into the state by the league (but over which defendant had no direct control), and participating (but as a non-party) in an earlier lawsuit. Such activities, said the court, were "miniscule" and unrelated to the cause of action. (368 FSupp at 1374.) Citing Dragor, supra, the court said that "presence in a state solely to participate in litigation is not, by itself, sufficient

connection with that state to make a person to the state's jurisdiction." (At p. 1369.) That is a correct statement of law only where, as in Dragor and Munchak, the previous litigation was limited or involuntary, and is unrelated to the cause of action for which extraterritorial jurisdiction is sought. Such decisions do not aid Mr. TUCKER. His personal, "constant" presence in California, his voluntary litigation conducted there at a feverish pace, and his perpetration of the underlying tort in the state, combine to make his an altogether different case.

Authority aside, Mr. TUCKER's thesis fails the test of reason. The argument that the power to litigate carries with it the right not to be litigated against—— that the power to sue, even to sue wrongfully, may be wielded in the absolute constitutional assurance that the wielder may not be held accountable in the same forum ——self-destructs on sight. On principle it is difficult to imagine any activity having a stronger logical tendency than one's own lawsuits to subject one to suit in the same place. It is noteworthy that Mr. TUCKER himself brought this action against appellees in a state where (for all that appears) they have never been. Personal jurisdiction was rested, and properly so, upon the

mere fact that they had filed the disputed judgment liens, allegedly a tortious act causing injury in Connecticut. California's jurisdiction over Mr. TUCKER in 1971 was at least as well founded.

The issue need not turn upon reason alone, in spite of Mr. TUCKER's claim that appellees' motion for summary judgment was "barren of a single citation to support litigation as a jurisdictional basis." Appellees find such support in International Shoe Co. vs State of Washington, supra, for in light of Mr. TUCKER's behavior in California Mrs. NEAL's federal action against him was well within the bounds of our traditional notions of fair play and substantial justice. More pointedly, perhaps, are appellees aided by even the negative rationale of Hanson vs Denckla, supra, for by maintaining his children in California and suing in its courts to "vindicate" their rights and his, he did some act, countless acts, by which he purposefully availed himself of the privilege of conducting activities there, thus invoking the benefits and protections of its laws. Most pointed of all, however, is a case just down, holding that the very activities of this Mr. TUCKER in California were sufficient for long-arm jurisdiction over him in that state. Threlkeld vs Tucker (9th Cir 1974), 496 F2d 1101.

3. WHETHER THE CALIFORNIA COURT HAD PERSONAL JURISDICTION OF MR. TUCKER: SERVICE OF PROCESS.

If allowed a collateral jurisdictional attack upon the California judgment, Mr. TUCKER's next contention is that he was not properly served with process. Mr. ANDERSON mailed summons and complaint to him in accordance with the California long-arm statute, Code Civ Proc § 415.40. It is agreed on this appeal that Mr. ANDERSON was qualified under California law to serve process (Br 6), Code Civ Proc § 414.10, but that he was not a person mentioned in Rule 4(c) of the Federal Rules of Civil Procedure. Mr. TUCKER received the summons and complaint in the orginary course of the mails, and signed a postal receipt therefor (App E11-E12); and, having actual notice of the proceedings, he thereafter appeared in the action and litigated the jurisdictional issue. He now contends that the court was nevertheless without jurisdiction, because process was required to be served by the U. S. Marshal or a person specially appointed by the federal court, and by no one else. He cites Veeck vs Commodity Enterprises, Inc. (9th Cir 1973), 487 F2d 423.

Rules 4(c), 4(d)(7) and 4(e) of the Rules of Civil Procedure have been synthesized into a single principle as to who may serve the process of the federal

court, viz.: Personal service must be made in accordance with Rule 4(c), that is, by the marshal or appointee; constructive service, on the other hand, may be performed by anyone authorized by the state or federal statute or rule of court under which the service is made. See 2 Moore's Federal Practice ¶ 4.08, in part as follows:

> "Rule 4(c) is subject to a second exception, not explicitly stated but which may be derived from the language of the other provisions of Rule 4, as amended in 1963. Thus where service of original process is made on a party who is not an inhabitant of or found within the state in which the district court is held, under a federal statute or a state statute or rule of court as provided in Rule 4(e), the service may be made in the manner provided in such federal statute or state statute or rule, and this would implicitly include reference to the means of making service under the practice envisioned in such federal federal or state statute or state rule of court * * *. (P. 1007.)
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> "Thus where the federal statute or order thereunder, or state statute or rule, calls for a mode of service of original process other than by personal delivery to the party, the mode envisioned by the federal or state provision may be followed. If an aspect of the service called for in the federal or state statute or rule is by publication or by notice mailed by plaintiff or his attorney, the marshal

or a person specially appointed by the court need play no part." (P. 1011, emphasis added; see also, ¶ 4.32(2), p. 1240.)

In Veeck vs Commodity Enterprises, Inc., supra, service of process was personal, and therefore governed by Rule 4(c). Service upon Mr. TUCKER from California was constructive, under the state statute, and thus outside the scope of that rule. If follows that the law explained by Moore, supra, was correctly applied by the Ninth Circuit to invalidate service in Veeck and by the district courts in California and Connecticut to sustain service in Mrs. NEAL's action.

4. WHETHER THE CALIFORNIA ACTION WAS BARRED BY LIMITATIONS.

Mr. TUCKER points out that he committed the underlying tort in 1965, and that the California two-year statute of limitation thereon ran in 1967. (Br 23) He then invokes the statute as if it barred Mrs. NEAL's action in the Northern District of California in 1971. The argument overlooks the fact that the 1965 tort was reduced to judgment in the state court in 1969, and the applicable limitation on judgments is 10 years. Calif Code Civ Proc § 337.5 subd 3. If Mr. TUCKER was trying to say that the merger of the tort into the judgment extinguished the tort as a jurisdictional basis, he is mistaken. See Threlkeld vs Tucker (9th Cir 1974), 496 F2d 1101, supra.

5. WHETHER THE CALIFORNIA JUDGMENT IS VOID FOR EXTRINSIC FRAUD.

In the compact, densely populated states of the northeast, it is probably not uncommon to cross a state line on the way to work or to the barber shop. That circumstance may lead to a good many more cases of federal diversity jurisdiction between individuals than in some other places. In California, most of the people are clustered in and around a few coastal centers, hundreds of miles from the state's inland boundaries, which run much of their courses through uninhabited expanses of mountain and desert. A federal court clerk in San Francisco may therefore be forgiven if he has not mastered all of the subtleties of Rule 4(e) of the Rules of Civil Procedure, for service of process out of state. Unlike his counterpart in New York City or Boston, he may hesitate in his duty under Rule 4(a) to issue summons "forthwith," when the document presented to him for signature and seal is in an unfamiliar state form. And he may balk at a request not only to issue it, but to return it to plaintiff's attorney, who will do God-knows-what with it, contrary to the clerk's experience with Rule 4(a), which seemingly commands him in all cases to deliver the summons straightaway to the marshal. Rather than take the law into his own hands,

he will ask for guidance from Above.

Above, of course, is the pantheon of the court's judges, and a plaintiff turned away at the clerk's counter will be compelled to make the kind of application which Mrs. NEAL made to Judge ZIRPOLI in the Northern District of California. (App E1-E10) Mr. TUCKER complains mightily of that submission, as a vast deception which predetermined the issue of the court's jurisdiction over him without notice or hearing. But the propriety of ex parte orders in appropriate circumstances is unquestioned. See Rule 6(d), FRCivP. And by its very nature as original process, summons is always issued ex parte. Rule 4(a), FRCivP. Judge ZIRPOLI's order of September 7, 1971, did no more than order that done which ought to have been done by the clerk "forthwith" upon the filing of the complaint. Ibid. Beyond that, the order ruled upon nothing, and all of Mr. TUCKER's rights were saved. Jurisdiction of him was only taken later, by service of the summons, and Mr. TUCKER thereafter objected to that jurisdiction at every opportunity, by motion, answer, and opposition to summary judgment, and was duly heard on the issue at each stage of the proceedings. He has failed to make a record in this case of the evidence presented in those proceedings, but it would be unreasonable to surmise that the jurisdictional

ruling in the California action was arbitrary and without evidentiary support—especially since Mr. TUCKER would have made no stronger showing than he did in the District of Connecticut, with a vague affidavit of one page, controverting nothing in the motion of appellees. But decision here does not turn upon such assumptions. Extrinsic fraud is that species of fraud which prevents a party from having a trial or presenting his case, so that the controversy is not fairly submitted. 37 AmJur2d 25 (Fraud and Deceit, § 6). Mr. TUCKER was fully and fairly heard in California, hence his charge of extrinsic fraud as a ground of collateral attack upon the judgment is untenable.

6. WHETHER THE JUDGMENT LIENS WERE INVALID BECAUSE NOT RECORDED BY THE UNITED STATES MARSHAL.

Mr. TUCKER contends that the judgment liens are invalid because they were not recorded by the U. S. Marshal as required, he says, by Rules 4(c) and 64 of the Rules of Civil Procedure. The point was raised in the district court and may have been foremost in the court's mind when it stated in its ruling on the summary judgment motions that it had found "the remainder of [Mr. TUCKER's arguments * * * to be without merit and undeserving of further comment." (App B16)

Rule 64, on the seizure of person or property, is plainly limited to certain specified judicial "remedies," available "[A]t the commencement of and during the course of an action," upon process of the court. Judgment liens in Connecticut are not such a remedy. Conn Gen Stats § 49-44. The liens are available to "[a]ny suitor having an unsatisfied judgment," merely upon the filing of a certificate to that effect signed by himself or his attorney or representative. Ibid. No judicial intervention is required for 15 years. Conn Gen Stats § 49-46. Such intervention would not be by the federal court, except upon independent jurisdictional grounds. Connecticut judgment liens are therefore not a remedy contemplated by Rule 64.

Even if judgment liens were such a remedy, Rule 64 itself provides for the application of state law, unless a federal statute applies. State law in this instance would be section 49-44, supra, which was followed in the filing of Mrs. NEAL's liens. Mr. TUCKER cites Rule 4(c), however, as a federal statute pre-empting state law, and thereby hangs his argument that the marshal must record liens. But since liens filed under the state statute are in no sense "process" of the federal court, Rule 4(c) has nothing whatever to do with them.

7. WHETHER MR. TUCKER WAS ENTITLED TO ADD THE PROPOSED THIRD COUNT TO HIS COMPLAINT, CHALLENGING THE CONNECTICUT JUDGMENT LIEN STATUTE.

Mr. TUCKER was denied leave of the district court to add a third count to his complaint, challenging the constitutionality of the Connecticut judgment lien law, Conn Gen Stats § 49-44, supra. The proposed amendment asked for a three-judge court to order the release of Mrs. NEAL's liens and to enjoin appellees from "ever again preparing and filing judgment liens against property" of Mr. TUCKER's in Connecticut. (App D4-D7)

The proferred third count would have failed in fundamental respects to state the occasion of a three-judge district court. The statute, 28 USC § 2281, is to be strictly construed. Swift & Co. vs Wickham (1965), 382 US 111, 86 SCt 258, 15 L ed 2d 194. It is not to be invoked unless the constitutional question is a substantial one. Alameda Conserv. Assn. vs State of California (9th Cir 1971), 437 F2d 1087, cert denied 402 US 908, 91 SCt 1380, 28 L ed 2d 649. The injunctive remedy contemplated by the statute can be directed only against an officer of the state, as a party to the action. Haffke vs State of California (CD Calif 1971), 325 FSupp 544; Aberdeen Cable TV Service, Inc. vs City of Aberdeen (SD 1971), 325 FSupp

406.

The third count failed, as well, to state a claim upon which relief could be granted. Its gist was contained in paragraph 3, alleging that the statute "permits" the filing of "pretended liens" or liens which are "false or invalid or excessive." (App D4-D5) The statute, of course, does not authorize its own perversion to improper uses, such as fraudulent liens; and while liens in excess of the judgment may be placed upon property, section 49-50 affords the debtor an action for discharge of any liens unnecessary for the reasonable security of the judgment debt. The statutory scheme actually tilts in favor of Mr. TUCKER, for the latter provision enables the judgment debtor to minimize his inconvenience, while persisting in a refusal to satisfy the judgment out of admittedly ample assets. For all of the grievous harm which Mr. TUCKER ascribes to the liens, some of them now more than two years old, he has yet not felt compelled to pay any part of the judgment.

The proposed amendment asserted the invalidity of the statute upon the further ground that notice and hearing prior to filing are not provided for, denying the judgment debtor due process of law. But notice and hearing come much earlier, before judgment, and furnish opportunity to meet the merits of the claim alleged.

Once judgment is entered against him, the debtor is presumed to know his lawful obligation and that his worldly goods are liable for it.

The proposed third count of the complaint presented only rudimentary questions of constitutional law, and they were correctly resolved by the district court in its refusal to allow the amendment.

8. WHETHER MR. TUCKER WAS ENTITLED TO AN ORDER OF THE DISTRICT COURT DISCHARGING "EXCESSIVE" JUDGMENT LIENS.

During the pendency of the action below, Mr. TUCKER moved for an order discharging Mrs. NEAL's liens from all of his properties but one, alleging that his equity in that one alone was more than sufficient to secure her judgment. The motion was denied. (App C1-C2) Mr. TUCKER contends on appeal that the ruling was error, citing Conn Gen Stats § 49-50, supra, and Rule 69(a) of the Rules of Civil Procedure.

Section 49-50 empowers a judgment debtor to "bring a complaint" to expunge liens in excess of reasonable security for the judgment, and "upon such allegation being proved," the court may grant appropriate relief. The statute creating the remedy did not intend it to be dispensed lightly, by the short-cut of motion, and the district court accordingly ruled "that the proper procedure for testing the adequacy of a judgment lienor's security is the presentation of live evidence in a hearing conducted for that purpose." (App C2) Moreover, foreclosure of the liens pursuant to Mrs. NEAL's counterclaims, already ordered by the court, would accomplish Mr. TUCKER's end by discharging the liens on everything not needed to

the judgment.

Rule 69(a), which speaks only of "process," does not, as Mr. TUCKER would have it, bar a judicial foreclosure of the liens. His argument is that the rule precludes federal jurisdiction of foreclosure proceedings. To the contrary, see, e.g., 28 USC § 2410; Cyclopedia of Federal Practice, Ch. 77.

9. WHETHER COMPETENT EVIDENCE IN THE DISTRICT COURT WARRANTED SUMMARY JUDGMENT FOR APPELLEES.

The final contention for reversal of the judgment is insufficiency of the evidence to warrant summary judgment under Rule 56(c) of the Rules of Civil Procedure. Mr. TUCKER urges that the affidavit of ROBERT R. ANDERSON submitted with appellees' motion was "the rankest hearsay," not admissible in even that fabled tribunal, "any court of the land." (Br 25)

Appellees were entitled to summary judgment without any affidavit at all. Their request for admissions filed July 20, 1973, went unanswered by Mr. TUCKER, who thereby admitted the California judgment, his failure to appeal from it, and its registration in Connecticut. That judgment alone was a complete defense to his present action and entitled Mrs. NEAL to foreclosure of her liens. Those admissions supplied all of the necessary "uncontroverted facts" upon which the district court founded its ruling that the doctrine of res judicata precluded a collateral attack upon the California judgment. (App B14) The court considered the ANDERSON affidavit (other than for "factual background," [App B2-B5]) only in respect of Mr. TUCKER's underlying contacts with the State of California, a matter "non-essential to [the court's] determination that the

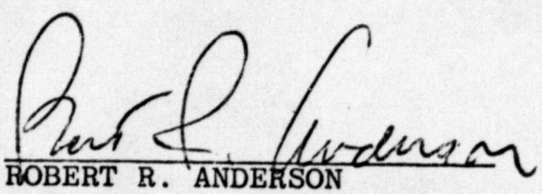
CONCLUSION

This appeal is the latest effort on the part of Mr. TUCKER, but by all odds not his last, to relitigate and thereby stave off his liability for malicious harm done to JEAN NEAL in California in 1965. His culpability was duly adjudicated in a California state court, over Mr. TUCKER's personal defense of the case to a jury. When the judgment of that court was ignored, and not enforceable directly against any assets of Mr. TUCKER, Mrs. NEAL brought action in the Northern District of California, which took long-arm jurisdiction of Mr. TUCKER on the basis of his aggressive activities in that state, including the injury-causing acts for which Mrs. NEAL had been awarded her damages. Mr. TUCKER appeared in the federal suit and litigated the court's jurisdiction, without success. His appeal from a post-judgment order was dismissed, and certiorari was denied. The judgment was now enforceable following registration in Connecticut, and Mrs. NEAL obtained judgment liens upon his properties there. This action in the District of Connecticut is but a collateral attack upon the California federal judgment and a frivolous fusillade against the state-law liens. As the district court found no genuine issue of fact, so should this court find no merit

to the appeal.

May the judgment of the district court be affirmed.

Respectfully submitted,



ROBERT R. ANDERSON

Joined by JEAN NEAL and
ANDERSON & ANDERSON, Appellees

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Santa Paula, California 93060

CERTIFICATE OF SERVICE

I, ROBERT R. ANDERSON, hereby certify that on September 30, 1974, I served the foregoing BRIEF FOR APPELLEES upon the appellant named therein by sending him two (2) true copies thereof by air mail from Santa Paula, California, with postage prepaid, addressed to him as follows:

STANLEY V. TUCKER
P. O. Box 35
Hartford, Connecticut 06101

Robert R. Anderson
ROBERT R. ANDERSON